IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.223 OF 1990

The State of Maharashtra .. Appellant.

V.

Jairam Narayan Rai
Age about 22 years
R/o. Shivaji Nagar,
Lighthouse Bldg. Wagle Estate
Thane .. Respondent.

Smt.U.V.Kejariwal A.P.P. for the appellant/State.

Mr.A.N.Maniyar for the respondent.

CORAM : SMT.RANJANA DESAI &
D.B.BHOSALE, JJ.

DATED : 17TH JUNE, 2005.

ORAL JUDGMENT: (PER D.B.BHOSALE, J.)

1. This appeal is filed against the judgment and order dated 7.12.1989 passed by the IX Additional District & Assistant Sessions Judge, Thane in Sessions Case No.78 of 1989 by which the respondent has been acquitted of the offence punishable under section 376 read with section 511 and 354 of the Indian Penal Code (for short "I.P.C."). The accused was charged and tried for the said offences on the allegations that he committed or attempted to commit rape on Vishaka

Vithal Berde, two year old child, on 25.4.1984 at 2.00 p.m. on the terrace of the building.

2. Briefly stated the facts of the prosecution case as unfolded from the evidence of the complainant - Sudha Berde, mother of the prosecutrix - Vishaka, are that on 25.4.1984 at about 2.00 p.m. she found that her children who were playing in the corridor were not seen and, therefore, to find them out she enquired with the neighbours. On the second floor of the building, a carpenter who was working informed her that her children went to the terrace with one boy. Both the children of the complainant, Vishaka and Sanket, were two and one year old respectively at the relevant time. She went to the terrace and found that door of a hall, adjoining to the terrace, was closed. She knocked the door. However, the accused who allegedly was in the hall with the children did not open the door. She claims that she heard cries of her daughter i.e. prosecutrix. Since the door was not opened she once again made enquiry with the carpenter as to who took her children to the terrace, when she was informed that accused - Jairam took the children to terrace. Since the accused was not opening the door she went down to approach the hall from other

wing of the building. Thereafter she again came down when she found that her children were crying and coming towards her. She picked up her daughter i.e. prosecutrix and took her in the house where she found that there was some sticky substance on her legs and her panty as well. On query made to the prosecutrix, it is alleged, that she told to the complainant about the act committed by the accused. The complainanat thereafter called her neighbours and narrated the incident. Thereafter the accused was called who initially denied the incident, subsequently admitted his guilt and tendered an apology. In the evening when the complainant's husband - Vithal Berde (P.W.1) returned from his office she narrated the incident to him. It is alleged that husband of the complainant having come to know about the incident went to the accused and slapped him. The prosecutrix was thereafter taken to Dr.Shejwalkar for treatment but he refused to treat her and asked them to lodge a complaint. However, on next day i.e. 26.4.2004 when the prosecutrix started sufferring from pain the complainant and her husband decided to lodge a comlpaint and that is how the FIR came to be lodged at 2.30 p.m. on 26.4.1984 at Wagle Estate police station. The police registered the offence bearing C.R.

No.31/1984 and set investigation in motion. During investigation medical examination of the prosecutrix was conducted, different panchnamas were drawn, statements of several witnesses were also recorded and on conclusion of the investigation the chargesheet was filed on 12.12.1984. Since the case was exclusively triable by the Court of Sessions it was committed to the Sessions Court, Thane. The defence propounded by the accused was of total denial. In the course of trial the prosecution examined as many as six witnesses mainly consisting of the mother of the prosecutrix (PW.5) and Dr.Sudhir Talegaonkar (PW.4). The prosecution also placed reliance upon the medical certificate issued by Dr.Talegaonkar, panchnamas of the scene of offence and seizure of the clothes of the prosecutrix and C.A. report. After having scrutinised the entire evidence the trial Court acquitted the accused of the offence punishable under section 376 by the impugned judgment.

3. Mrs.Kejriwal, learned A.P.P. assailed the judgment of the trial Court contending that the medical evidence coupled with the testimony of the complainant (PW.5) and her husband (PW.1) was sufficient to bring home the guilt of the accused.

Oral evidence of the complainant has been corroborated by PW.1 in all material particulars. She further submitted that Dr.Talegaonkar (PW.4), on the basis of the medical certificate issued by him, though fairly stated that no rape was committed on the prosecutrix, has clearly opined that an attempt to commit rape was made. Mrs.Kejriwal, therefore, submitted that the opinion expressed by the doctor is sufficient to hold the accused guilty of the said offence. Our attention was also drawn to the evidence of the complainant who according to the learned A.P.P., has given detail account as to what happended on the date of incident. Her testimony which finds corroboration from other material is sufficient to show the complicity of the accused. The learned trial Judge, according to Mrs.Kejriwal, has committed manifest illegality in appreciation of the evidence and acquitting the accused on the basis thereof. On the other hand Mr.Maniyar, learned counsel for the respondent/accused stated that except the opinion of the doctor there is absolutely no material on record to hold the accused guilty of the alleged offence of rape under section 376 of the I.P.C. He pointed out the omissions and discrepancies in evidence of the complainant (PW.5) and her husband (PW.1) and contended that the trial

court has appreciated it in a proper prespective and even if it is assumed that the conclusion arrived at is wrong, it cannot be termed as perverse requiring interference by this Court. In support of his contentions he placed reliance on the judgment of the Apex Court in **Tota Singh and Anr. Vs. State of Punjab AIR 1987 SC Page 1083**. We heard the learned counsel appearing for the parties for quite sometime. Perused the entire evidence on record with their assistance. We were conscious of the fact that we are dealing with the appeal against acquittal.

4. The Apex Court in **Tota Singh's** case (supra) has observed that the jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by the Court acting reasonably an judiciously and is, therefore, liable to be characterised as perverse. It was further observed that where two views are possible on an appraisal of the evidence adduced in

the case and court below has taken a view which is plausible one, the appellate court cannot lightly interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous. This Court in **State of Maharashtra Vs. Haribhau Krishnaji Deshmukh and Others** had an occasion to consider entire case law on the point as settled by the Supreme of India in respect of appeals against the acquittal beginning with first available decision of the Privy Council reported in AIR 1934 PC Page 227 upto AIR 1996 SC 2478, observed that the High Court can interfere with the order of acquittal only when "(1) The appreciation of evidence by the trial court is perverse or the conclusion drawn by it cannot be drawn on any view of the evidence. (2) Where the application of law is improperly done. (3) Where there is substantial omission to consider the evidence existing on record. (4) The view taken by the acquitting court is impermissible on the evidence on record. (5) If the order of acquittal is allowed to stand it will result the miscarriage of justice".

5. Keeping the well settled position of law in view we scrutinised the entire evidence on record. The complainant Sudha Berde (PW.5) has narrated as

to what happened on the date of incident in her examination in chief. While stating the case of the prosecution in brief, we have referred to her examination in chief. In the cross examination the complainant, in so far as the name of accused is concerned, has stated that she imagined that it must be accused - Jairam, who took her children to the terrace. She again stated that carpenter told her the name of accused. How the carpenter was knowing the name of the accused has not been explained by the prosecution. She further states that the carpenter was also taken by her to the terrace probably to make the said boy to open the door of the hall where the alleged incident occurred. However, no efforts were made by the carpenters to open the door though she states that she heard cries of her children from the said hall. Moreover, she did not raise hue and cry or shout for help. Her conduct was not only unnatural but improbable. A mother finding that her children are in a room alongwith someone who is likely to cause harm to them would not react in the manner in which the complainant reacted. She claims that she narrated the alleged incident to her neighbour - old Gujrati lady. The prosecution, however, did not make any efforts to examine either the said old lady or the carpenters who could have lend

assurance to her version. In fact they would have been the best witnesses to corroborate the testimony of the complainant. This lacuna and the deficiency, in the prosecution case creates doubt about its veracity. The complainant in the cross examination has stated that she was knocking the door for five minutes and then she went down to approach the hall on the terrace from the other wing of the building and having failed in that effort also when she came down she saw her children coming up from the ground floor and they were crying. According to the prosecution at the relevant time the prosecutrix was two years old and her younger brother was hardly one year old. It is difficult to believe and/or conceive that the complainant saw her two children coming together and were crying. She does not state as to who was accompanying children who was carrying the one year old brother of the prosecutrix. Further, in the cross examination she confirms that the alleged act of rape or attempt to commit rape by the accused was narrated to her by the prosecutrix. It would not be possible to accept that the prosecutrix, who was hardly two years old could narrate the act of rape. Even if it is assumed that the prosecutrix did narrate the incident as stated by the complainant in paragraph 3 of her examination in

chief, except bare words of the complainant there is absolutely nothing on record to support that version much less the medical evidence. For all these reasons and the questions, which remained unanswered by the prosecution, in our opinion, testimony of the complainant does not inspires confidence. The doctor (PW.4) in his testimony has clearly stated that no rape was committed on the prosecutrix. He simply opined that there could be an attempt to commit sexual intercourse. The doctor, on examination of the prosecutrix, in the medical certificate has recorded his findings as under:

> "1. Hymen intact.
> 2. Clitoris is inflamed.
> 3. Both Labia majora are inflamed.
> 4. Abrasions about 1/2" in length over left labia majora.
> 5. No P.V.bleeding.
> Above findings indicate that attempt has been done for sexual intercourse".

5.1 In the cross examination, the doctor has opined that the abrasion, as described by him in the certificate, is possible by itching due to ringworm infection. The doctor did not find any sign whatsoever of rape having been committed on the prosecutrix. Moreover, the doctor did not make any attempt to seek any information or narration of

the alleged offence from the prosecutrix. The history was given to the doctor by the complainant. Dr.Talegaonkar (PW.4) has also stated in the cross examination that he issued certificate at the instance of the parents of the prosecutrix. In our opinion, the medical examination does not support the prosecution case at all to prove the offence under section 376 of the I.P.C. In so far as the evidence of father of prosecutrix - Vithal Berde (PW.1) is concerned, his testimony is of no use to the prosecution. As a matter of fact, the complainant claims that on the next day when the prosecutrix started sufferring pain she talked to her husband on phone and then they both went to lodge F.I.R. No such effort was made by the complainant to contact her husband on the date of incident. She narrated the incident to her husband when he came back from office in the evening. She states that immediately after the incident she called her neighbours and in particular an old Gujarati lady and narrated the incident. The prosecution, however, did not examined any of the neighbours in support of this case. Further the complainant (PW.5) and her husband (PW.1) have clearly stated that on the very day in the evening they took the prosecutrix to Dr.Shejwalkar, who refused to examine her on the ground that it was a

police case. Despite that they did not take her either to the police for lodging FIR or to the government hospital for medical treatment. No satisfactory explanation is forthcoming from these witnesses as to why they kept quite for 24 hours.

6. That takes us to consider the evidence of the attachment of clothes of the prosecutrix and C.A. report. The complainant (PW.5) claims that she removed clothes of the prosecutrix and kept them in a plastic bag. In the cross examination she states that she handed over plastic bag containing clothes of her daughter to the police. Raju Parshuram (PW.3) acted as pancha of the panchnama of scene of offence and attachment of the clothes of the prosecutrix. He did not make any reference to the plastic bag containing clothes of the prosecutrix. He simply stated that the complainant produced one frock and panty of her daughter. Vithal Berde (PW.1) also has not made any reference to the plastic bag containing clothes of his daughter being handed over to the police. In so far as the chemical analyser's report is concerned, it does not support the prosecution case at all. The chemical analyst has opined that neither blood nor semen was detected on the clothes of the prosecutrix. It is very interesting to note

that the clothes of the prosecutrix were found washed. It remained unexplained as to who and when the clothes of the prosecutrix were washed. The other witnesses such as Arun Pawar (PW.6) and Jayantibai Shetty (PW.2) could not take the prosecution case any further. The learned trial Judge has rightly discarded the testimony of the complainant, her husband, the doctor and the other evidence such as attachment of the clothes of the prosecutrix, C.A report etc. On appreciation of evidence, in our opinion, the learned trial Judge has rightly come to the conclusion that the prosecution has failed to prove the guilt of the accused. We have reappreciated the evidence to satisfy our conscience and to find out whether findings and the conclusion arrived at by the trial Court are perverse. The view taken by the trial court is possible on the evidence on the record. In any case if the impugned judgment and order of acquittal is allowed to stand definitely it would not result in miscarriage of justice. In such state of affairs we confirm the finding recorded by the trial Court, since, in our opinion, they are not perverse. There is no ground to interfere with such well balanced order of acquittal made on proper appreciation of evidence on record. We, therefore, dismiss the appeal against acquittal.

We, hereby confirm the order of acquittal. Bail Bonds, if any, executed under section 390 of Criminal Procedure Code stand cancelled.

(SMT.RANJANA DESAI, J.)

(D.B.BHOSALE, J.)

HIGH COURT AT BOMBAY
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CRIMINAL APPEAL NO.223 OF 1990

Date of Decision: 17th June, 2005.

For approval and signature:

The Hon'ble Smt. Justice : Ranjana Desai

And

The Hon'ble Mr.Justice : D.B. Bhosale

1. Whether Reporters of Local papers may be allowed to see the judgement ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Office?